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AUTHORITIES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1924.

THE UNITED STATES, APPELLANT, v. P. LORILLARD COMPANY. } No. 4.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The facts.

This is a suit to recover $145,397.50, paid by the claimant as *floor taxes* on 153,050,000 cigarettes manufactured by it and held for sale prior to the passage of the Revenue Act of February 24, 1919 (40 Stat., 1057, 1118), but subsequently exported by it between August 29 and November 21, 1919. (Record, 7.) The sum involved represents the "floor tax" imposed by Section 702 of the Revenue Act of 1918, which was at the rate of 95 cents per thousand.

Claimant had been engaged for some time prior to the passage of the Revenue Act of 1918 (February 24, 1919) in the manufacture of cigarettes and other

tobacco products for domestic consumption as well as for export. On the effective date of said Act (February 25, 1919) claimant had in its possession a large quantity of "Nebo" cigarettes which it had manufactured and removed from its factory. These cigarettes were on that date held by it and intended for sale in the domestic trade. (Record, 3, 4.) There were affixed to the packages containing the cigarettes the internal-revenue stamps for which the claimant had paid the Government under the revenue laws in force when the cigarettes were removed by it from its factory (Sec. 3394, Revised Statutes, imposing a stamp tax of $1.25 per thousand, and Sec. 400 of the Revenue Act of 1917, imposing a stamp tax of 80 cents per thousand), which aggregated a rate of $2.05 per thousand cigarettes. These cigarettes were inventoried by the claimant in its return of tobacco products held and intended for sale on the effective date of the Revenue Act of 1918 (February 25, 1919).

On August 19, 1919, claimant contracted for the sale and export of these cigarettes (R. 6). At that time it had received no response to its letter of August 6, 1919 (R. 4–6), requesting an opinion from the Bureau of Internal Revenue as to whether it would be entitled to an allowance or drawback of the "floor tax" of 95 cents per thousand imposed by Section 702 of the Revenue Act of 1918.

On August 22, 1919, the Commissioner of Internal Revenue informed the claimant by letter (R. 6, 7) to the effect that the drawback privilege provided

by Section 3386, Revised Statutes, did not embrace floor taxes; that the "floor tax" imposed by Section 702 of the Revenue Act of 1918 was in the nature of an additional tax, independent of and separate from the stamp taxes previously paid by claimant, and that the floor tax did not increase the amount of the original tax nor did it increase the amount originally paid for stamps. Formal claims for drawback covering the stamp taxes aggregating $2.05 per thousand and the "floor tax" of 95 cents per thousand paid on cigarettes before exportation were then filed with the Commissioner (R. 8), who, on March 15, 1920, allowed the claims *only* as to the $2.05 per thousand but rejected them as to the additional or "floor tax" of 95 cents per thousand. (R. 8, 9.)

The claim for refund or drawback of the tax of 95 cents per thousand was again presented to the Commissioner and fully argued on brief. (R. 9.) On February 28, 1921, the Commissioner communicated in writing to counsel for claimant his ruling, again rejecting the claims for refund (R. 9–12), and assigned the following reasons therefor: That the "floor tax" of 95 cents per thousand was not refundable under Section 3386, Revised Statutes, because (a) Congress has designated that tax as a "floor tax," and it was in the nature of an additional tax independent of and separate from the stamp taxes paid; (b) the floor tax was collectible by assessment and not by the sale of suitable stamps to be affixed to the packages containing the cigarettes before their removal from the factory;

(c) that it applied to tax-paid cigarettes *after* their removal from the factory, whereas stamp taxes applied *before* removal; (d) that it applied to cigarettes held, on February 25, 1919, by any person and intended for sale and not merely to manufacturers or importers of cigarettes.

On October 20, 1921, counsel for claimant wrote the Commissioner (R. 12, 13), requesting reconsideration of the aforesaid ruling upon the ground that in the presentation of the subject no consideration was given to Section 1310 (c) of the Revenue Act of 1918. On November 5, 1921, the Solicitor of Internal Revenue wrote counsel for claimant (R. 14) to the effect that Section 1310 (c) was not applicable to claimant's particular case; that the claim for refund would not then be reopened, but that counsel could file an additional brief requesting the reopening of the claim, which would receive careful attention; and if it was thought the action of the Bureau in rejecting the claim was erroneous, its reopening would be recommended. (R. 14.) The claim was again argued on brief and orally, and on March 8, 1922, the Commissioner reaffirmed the reasons previously given for the rejection of the claim and stated that Section 1310 (c) was inapplicable for the following reasons (R. 15):

> After the claim for drawback had been rejected in so far as it concerned the floor tax, you called the attention of this office to the provisions of Section 1310 (c) of the Revenue Act of 1918, as authorizing the refund of the floor tax, with the request that the claim be

reopened. This office declined to reopen the taxpayer's claim, but expressed its willingness to give consideration to any arguments you might care to make in support of your contention.

After careful consideration of your arguments, both oral and written, this office has, upon the advice of the Solicitor of Internal Revenue, reached the conclusion that Section 1310 (c) of the Revenue Act of 1918 can not be given the effect for which you contend.

In your briefs you have laid stress upon the immunity from taxation provided by the Constitution for articles exported, arguing that the enactment of the drawback statute was a recognition by Congress of its inability to lay a tax upon tobacco manufactured for export, and that consequently the drawback statute is not an exemption from taxation, and, as such, to be strictly construed. But this argument ignores the doctrine laid down in *Cornell* v. *Coyne*, 192 U. S. 418, 427, that "subjecting" an article "manufactured for the purpose of export to the same tax as all other" articles of the same kind "is casting no tax or duty on articles exported, but is only a tax or duty on the manufacturing of articles in order to prepare them for export."

On May 23, 1922, the claimant commenced its suit in the Court of Claims. On October 29, 1923, the Court of Claims rendered a judgment in favor of the claimant for the full amount for which it sued. The Court of Claims found as a fact that the tax levied by Section 702 of the Revenue Act of 1918,

and by Congress called a "floor tax" was the same character of tax theretofore paid by affixing stamps, and that the "floor tax" does not differ from the others when the amount of drawback is to be determined. The Court of Claims concluded its opinion in the following language (R. 18):

> We see no reason why the value of the stamps first affixed may not under the custom and practice mentioned be determined by the total of the three taxes paid, unless the view that the floor tax was paid in cash, and was therefore not within the drawback statute, can be maintained. As already said, in our opinion the payment of the tax, whether in the one form or the other, comes within the spirit and intent of the statute authorizing the drawback when the goods upon which the tax has been paid are exported. The Treasury officials readily conceded the right of drawback as to two of the taxes, notwithstanding the goods had been taken from the factory and held for sale. They apparently recognize that the fact of export is sufficient to secure the right of drawback, so far as those items are concerned. We think the "floor tax" does not differ from the others when the amount of drawback is to be determined.
>
> There was no necessity for "protest" under the facts of this case. Plaintiff's goods came within the provision of the statute imposing the floor tax, and the tax was paid. Thereafter the goods were exported. If they had not been exported, there would be no drawback. Its cause of action arose, not when it

paid the tax, but when it exported the goods and the drawback was refused. We do not allow interest because, in our opinion, the claim does not come within the provisions of Section 1324 of the Revenue Act of 1921, 42 Stat. 316.

Our conclusion is that the plaintiff is entitled to recover the taxes paid, and judgment will be entered accordingly. And it is so ordered.

The statutes.

The pertinent statutes are as follows:

Section 702, Revenue Act of 1918 (40 Stat. 1057, 1118):

That upon all the articles enumerated in Section 700 or 701, which were manufactured or imported, and removed from factory or customhouse on or prior to the date of the passage of this Act, and upon which the tax imposed by existing law has been paid, and which are, on the day after the passage of this Act, held by any person and intended for sale, there shall be levied, assessed, collected, and paid a floor tax equal to the difference between (a) the tax imposed by this Act upon such articles according to the class in which they are placed by this title, and (b) the tax imposed upon such articles by existing law other than Section 403 of the Revenue Act of 1917.

Section 1306, Revenue Act of 1918 (40 Stat. 1142):

That where floor taxes are imposed by this Act in respect to articles or commodities, in respect to which the tax imposed by existing law has been paid, the person required by this

Act to pay the tax shall within thirty days after its passage make return under oath in such form and under such regulations as the Commissioner, with the approval of the Secretary, shall prescribe. Payment of the tax shown to be due may be extended to a date not exceeding seven months from the passage of this Act, upon the filing of a bond for payment in such form and amount and with such sureties as the Commissioner, with the approval of the Secretary, may prescribe.

Section 3386, Revised Statutes (amended by Sec. 16, Act of March 1, 1879, 20 Stat. 327, 347):

There shall be an allowance of drawback on tobacco, snuff, and cigars on which the tax has been paid by suitable stamps affixed thereto before removal from the place of manufacture, when the same are exported, equal in amount to the value of the stamps found to have been so affixed; the evidence that the stamps were so affixed, and the amount of tax so paid, and of the subsequent exportation of the said tobacco, snuff, and cigars, to be ascertained under such regulations as shall be prescribed by the Commissioner of Internal Revenue, and approved by the Secretary of the Treasury. Any sums found to be due under the provisions of this section shall be paid by the warrant of the Secretary of the Treasury on the Treasurer of the United States, out of any money arising from internal duties not otherwise appropriated:

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Provided, That no claim for an allowance of drawback shall be entertained or allowed until

a certificate from the collector of customs at the port from which the goods have been exported, or other evidence satisfactory to the Commissioner of Internal Revenue, has been furnished, that the stamps affixed to the tobacco, snuff, or cigars entered and cleared for export to a foreign country were totally destroyed before such clearance; nor until the claimant has filed a bond, with good and sufficient sureties, to be approved by the collector of the district from which the goods are shipped, in a penal sum double the amount of the tax for which said claim is made, that he will procure, within a reasonable time, evidence satisfactory to the Commissioner of Internal Revenue that said tobacco, snuff, or cigars have been landed at any port without the jurisdiction of the United States, or that after shipment the same were lost at sea and have not been relanded within the limits of the United States.

Section 1310 (c), Revenue Act of 1918 (40 Stat. 1144):

Under such rules and regulations as the Commissioner with the approval of the Secretary may prescribe, the taxes imposed under the provisions of Titles VI, VII or IX shall not apply in respect to *articles sold* or leased *for export and in due course so exported.* Under such rules and regulations the amount of any *internal-revenue tax erroneously or illegally collected in respect to exported articles may be refunded to the exporter of the article*, instead of to the manufacturer, if the manufacturer waives any claim for the amount so to be refunded. [Italics ours.]

The regulations.

The pertinent regulations are as follows:

Regulations issued in T. Mim. 2050, published as Treasury Decision 2799, dated March 12, 1919 (Treasury Decisions, vol. 21, p. 50), from which the following is quoted:

> The following regulations are promulgated in pursuance of the sections of the Act of 1918 quoted above:
>
> 1. *Floor tax* is an additional tax imposed on articles held and intended for sale by dealers and others on which the tax has already been paid. The floor tax to be levied, assessed, collected, and paid, as stated above, on all cigars, cigarettes, tobacco, and snuff removed tax-paid from factory or custom-house and held and intended for sale on the day after the approval of the Revenue Act of 1918, is equal to the difference between (a) the tax imposed by said Act on such articles according to the class in which they are placed by this Title (Title VII, Sections 700 and 701), and (b) the tax imposed on such articles by existing law other than Section 403 of the Revenue Act of 1917. The language of the new Act does not allow any credit for floor tax previously paid. In respect to cigars weighing more than 3 pounds per 1,000, (a) represents the new rate as determined by the retail price before the commencement of business on February 25, 1919, and (b) the rate of tax paid as indicated by the class of stamp affixed to each package. No exemptions are allowed. The following

table, in which (a) and (b) as used in the Act are exemplified and in which the items are numbered to correspond with returns forms, shows how the floor-tax rates on the articles enumerated are determined.

Restatement of the Issues.

Is the "floor tax" of 95 cents per thousand imposed by Section 702 of the Revenue Act of 1918 refundable as an allowance or drawback under Section 3386, Revised Statutes, upon cigarettes which were held and intended for sale on February 25, 1919, the effective date of the Revenue Act of 1918, but were subsequently exported?

Where on the effective date of the Revenue Act of 1918 the cigarettes were merely "held and intended for sale" in the claimant's warehouse and the contract for export sale was not entered into until subsequent thereto, does Section 1310(c) of that Act authorize a refund of the "floor tax"?

ARGUMENT.

I.

The "floor tax" imposed by Section 702 is not the same as the stamp tax imposed by Section 700 or Section 701, but is a separate and additional tax which attaches to articles "held by any person and intended for sale" on the effective date of the Act, and hence is not subject to drawback or refund under Section 3386, Revised Statutes.

The cigarettes, the payment of tax on which furnishes the basis for claimant's claim, were, after

their manufacture, deposited by claimant in its warehouse, and were in claimant's warehouse before, on, and after February 25, 1919, the effective date of the Revenue Act of 1918 levying the "floor tax" upon goods "held or intended for sale." The contracts for the sale of the cigarettes in question for export trade were executed August 19, 1919, seven months after the passage and effective date of the Revenue Act of 1918.

The "floor tax" assessed under the provisions of Section 702 is not the same character of tax as the stamp tax on cigarettes levied by Sections 700 and 701. The "floor tax" levied by Section 702 on cigarettes *held by any person* and intended for sale was an equalizing and war-emergency tax. It was a tax assessed against the cigarettes *held by any person* (manufacturer, wholesaler, or retailer) and it embraces *persons* whom Congress knew did not pay tax by the affixing of stamps. The "floor tax" is more closely related to an ad valorem tax than a stamp tax. It was not a tax paid by stamps. The only tax refundable under the provisions of Section 3386, Revised Statutes (as amended by Section 16, Act of March 1, 1879, 20 Stat. 327, 347), is a tax that has been paid by stamps.

Section 3386, as extended by Section 3387, Revised Statutes, provides for an allowance of drawback on tobacco products, including cigarettes, "on which the tax has been paid by suitable stamps, affixed thereto before removal from the place of manufacture, when the same are exported," and that allowance is to be

"equal in amount to the stamps that have been so affixed." The evidence that the "stamps were so affixed and the amount of the tax so paid" is to be ascertained "under such regulations as shall be prescribed by the Commissioner of Internal Revenue."

Section 700 imposed a tax in lieu of the tax theretofore imposed *upon articles not previously removed*, to be paid by the *manufacturer or importer when these articles are sold or removed* from the factory or customhouse. Section 701 imposed a new rate of tax on tobacco and snuff in lieu of "the internal-revenue taxes now imposed by law." The tax on manufactured tobacco products accrues upon their release from factory where made or from customs custody. Section 702 imposed an additional or "floor tax" upon *tax-paid articles which have theretofore been removed*, to be paid by *any person* holding them for sale. Section 700 imposed the tax upon articles *manufactured or imported and sold or removed*. Section 702 imposed the tax upon articles *held and intended for sale*, and this is designated as the "floor tax."

The tax under Section 702 differs from that imposed by Section 700 in regard to the persons who must pay it and as to the status of the articles with reference to which it is imposed. Section 702 refers to Sections 700 and 701 merely for determination of the *kinds of articles* which are subject to the tax. Moreover, the tax imposed by Section 702 is to be "assessed," while that imposed by Sections 700 and 701 is to be *paid by stamps*.

The distinction between the tax imposed by Sections 700 and 701 and that imposed by 702 is that the effect of the two former sections is to increase the value of stamps on hand affixed or to be affixed by the manufacturer or importer, before the removal of the tobacco products from the factory or the customs, whereas, by the latter section, the tax is imposed upon the tax-paid tobacco *products* themselves, if "held by any person and intended for sale," on the effective date of the Act. The "floor tax" *accrues* on the articles themselves on the effective date of the Act, and Section 702 provides specifically for its collection by *assessment*.

II.

Section 1310 (c) of the Revenue Act of 1918 does not authorize refund of the floor tax imposed by Section 702.

The theory of claimant's case is that it is entitled as of right to a drawback under Section 3386, Revised Statutes, and refund under the provisions of Section 1310 (c) of the Revenue Act of 1918.

Claimant can not recover on the theory of drawback under the provisions of Section 3386, Revised Statutes, because the "floor tax" is not paid by stamps.

The claimant is not entitled to recover under the provisions of Section 1310 (c) because on February 25, 1919, the effective date of the "floor tax" provision of the Revenue Act of 1918, the goods had not been sold for export trade, but were "held and

intended for sale" in claimant's warehouse. The contracts for export were not made until August 19, 1919.

The mere fact that some of the articles on which the tax was levied, *assessed,* and collected were *subsequently sold in export trade* is not sufficient to bring them within the excepted class. The case comes squarely within the principle announced in *Cornell* v. *Coyne*, 192 U. S. 418, 427, wherein it is said:

> The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. *The exemption attaches to the export and not to the article* before its exportation. [Italics ours.]

It will be seen from a reading of Section 702 that it levies the tax uniformly on all property coming within its provisions on the 25th day of February, 1919, situated in the United States and held by *any person and intended for sale.* The provisions of this section do not offend against Article 1, Section 9, Clause 5, of the Constitution. The tax is not levied as a tax on exports. Mr. Justice Miller, in his Lectures on the Constitution (page 592), says:

> The Congress of the United States, during the late Civil War, imposed a tax upon cotton and tobacco, which tax was not limited to those products when in the process of transportation, but was assessed on all the cotton

> and tobacco in the country. It was argued that because the larger part of these products was exported out of the country and sold to foreign nations, and because their production was limited to a particular part of the country, the tax was forbidden by the corresponding clause of the Constitution prohibiting Congress from levying a tax on exports. Although the question came at that time to the Supreme Court of the United States, it was not then decided, because of a division of opinion in that court. The recent cases, however, of *Coe* v. *Errol*, 116 U. S. 517, and *Turpin* v. *Burgess*, 117 U. S. 504, seem to decide that the objection was not valid, and hold that only such property as is in the actual process of exportation, and which has begun its voyage or its preparation for the voyage, can be said to be an export.

The above quotation from Mr. Justice Miller's lectures is referred to by the Supreme Court in *Cornell* v. *Coyne, supra*, and it is said (192 U. S. 428–430):

> Some light is thrown on this question by the cases of *Kidd* v. *Pearson*, 128 U. S. 1, and *United States* v. *E. C. Knight Company*, 156 U. S. 1. In the former a manufacturer of intoxicating liquors in Iowa claimed to be beyond the reach of the prohibitory law of the State on the ground that he manufactured only for exportation, and therefore as Congress had exclusive control over interstate commerce it had like control over the manufacture for interstate commerce. But this court, in an elaborate opinion by Mr. Justice Lamar, unanimously held against the conten-

tion, and decided that commerce did not commence until manufacture was finished, and that therefore the State was not prevented from exercising exclusive control over the manufacture. In the latter case the question was whether a monopoly of the business of manufacturing sugar within a State was a restraint of interstate commerce, and therefore within the purview of the act of Congress to protect trade and commerce against unlawful restraints and monopolies, 26 Stat. 209, and it was held that it did not, Chief Justice Fuller, announcing the opinion of the court, saying (pp. 12 and 13):

"Commerce succeeds to manufacture, and is not a part of it. * * * The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce."

There is nothing in the case of *Fairbank* v. *United States*, 181 U. S. 283, inconsistent with these views. There the question was as to the validity of a stamp tax on a foreign bill of lading, and it was held that it was a tax directly on the exportation. As said in the opinion with reference to the constitutional provision (p. 292): "The purpose of the restriction is that exportation, all exportation, shall be free from national burden." It is unnecessary to refer to the earlier legislation of Congress which, as shown by counsel for the Government in his brief, has been in

harmony with this construction. From what we have said it is clear that there is no constitutional objection to the imposition of the same manufacturing tax on filled cheese manufactured for export and, in fact, exported, as upon other filled cheese.

In *Patton* v. *Brady*, 184 U. S. 608, the Court had under consideration a provision of law identical with Section 702, as follows:

> And there shall also be assessed and collected, with the exceptions hereinafter in this section provided for, upon all the articles enumerated in this section which were manufactured, imported, and removed from factory or customhouse before the passage of this act bearing tax stamps affixed to such articles for the payment of the taxes thereon, and canceled subsequent to April fourteenth, eighteen hundred and ninety-eight, *and which articles were at the time of the passage of this act held and intended for sale by any person*, a tax equal to one-half the difference between the tax already paid on such articles at the time of removal from the factory or customhouse and the tax levied in this act upon such articles.
>
> *Every person having on the day succeeding the date of the passage of this act any of the above-described articles on hand for sale in excess of one thousand pounds* of manufactured tobacco and twenty thousand cigars or cigarettes, and which have been removed from the factory where produced or the customhouse through which imported, bearing the rate of tax payable thereon at the time of such removal, shall make

> a full and true return, under oath, in duplicate, of the quantity thereof, in pounds as to the tobacco and snuff and in thousands as to the cigars and cigarettes so held on that day, in such form and under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe. * * * (Italics ours.)

The above-quoted provision of law is in Section 3 of the Act of June 13, 1898, passed by Congress to meet the expenditures of the Spanish-American War. (30 Stat. 448.) In *Patton* v. *Brady* the complaint of the taxpayer was that Section 3 of the Act of June 13, 1898, imposing said *additional tax*, is repugnant to the Constitution in that his property had been twice subjected to taxation. The Court said (184 U. S. at 617-618):

> Ever since the early part of the Civil War there has been a body of legislation, gathered in the statutes under the title Internal Revenue, by which, upon goods intended for consumption, excises have been imposed in different forms at some time intermediate the beginning of manufacture or production and the act of consumption. Among the articles thus subjected to those excises have been liquors and tobacco, appropriately selected therefor on the ground that they are not a part of the essential food supply of the Nation, but are among its comforts and luxuries. The first of these acts, passed on July 1, 1862, 12 Stat. 432, in terms provided for "the collection of internal duties, stamp duties,

licenses or taxes imposed by this act," and included manufactured tobacco of all descriptions. Subsequent statutes changed the amount of the charge, the act of 1890 reducing it to six cents a pound. Then came the act in question, which, for the purpose of providing means for the expenditures of the Spanish War, increased the charge to 12 cents a pound, specifying distinctly that it was to be "in lieu of the tax now imposed by law." Nothing can be clearer than that in these various statutes, the last included among the number, Congress was intending to keep alive a body of excise charges on tobacco, spirits, etc. It may be that all the taxes enumerated in these various statutes were not excises, but the great body of them, including the tax on tobacco, were plainly excises within any accepted definition of the term.

Turning to Blackstone, vol. 1, p. 318, we find an excise defined: "An inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption." This definition is accepted by Story in his Constitution of the United States, Sec. 953. Cooley in his work on Taxation, page 3, defines it as "an inland impost levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades, or to deal in certain commodities." Bouvier and Black, respectively, in their dictionaries give the same definition. If we turn to the general dictionaries, Webster's International calls it "an inland duty or im-

post operating as an indirect tax on the consumer, levied upon certain specified articles, as tobacco, ale, spirits, etc., grown or manufactured in the country. It is also levied on licenses to pursue certain trades and deal in certain commodities." The definition in the Century Dictionary is substantially the same, though in addition this is quoted from Andrews on Rev. Law, Sec. 133: "Excises is a word generally used in contradistinction to imposts in its restricted sense, and is applied to internal or inland impositions, levied sometimes upon the consumption of a commodity, sometimes upon the retail sale of it, and sometimes upon the manufacture of it."

Some of these definitions were quoted with approval by this court in the *Income Tax cases*, and while the phraseology is not the same in all, yet so far as the particular tax before us is concerned, each of them would include it. The tax on manufactured tobacco is a tax on an article manufactured for consumption, and imposed at a period intermediate the commencement of manufacture and the final consumption of the article.

The emergency warranting the additional tax involved in the *Patton case, supra*, is the same character of emergency as exists in the case at bar. On this phase of the case, the Court said (at pages 619–621):

> It must be remembered that taxes are not debts in the sense that having once been established and paid all further liability of the individual to the Government has ceased. They

are, as said in Cooley on Taxation, page 1: "The enforced proportional contribution of persons and property, levied by the authority of the State for the support of the Government and for all public needs," and so long as there exists public needs just so long exists the liability of the individual to contribute thereto. The obligation of the individual to the State is continuous and proportioned to the extent of the public wants. No human wisdom can always foresee what may be the exigencies of the future, or determine in advance exactly what the Government must have in order "to provide for the common defense" and "promote the general welfare." Emergencies may arise; wars may come unexpectedly; large demands upon the public may spring into being with little forewarning; and can it be, that having made provision for times of peace and quiet, the Government is powerless to make a further call upon its citizens for the contributions necessary for unexpected exigencies.

That which was possible in fact existed. A war had been declared. National expenditures would naturally increase and did increase by reason thereof. Provision by way of loan or taxation for such increased expenditures was necessary: There is in this legislation, if ever such a question could arise, no matter of color or pretense. There was an existing demand, and to meet that demand this statute was enacted. The question, therefore, is whether Congressional provision must reach through an entire year and at the beginning

finally determine the extent of the burden of taxes which can be cast upon the citizen during that year, with the result that if exigencies arise during the year calling for extraordinary and unexpected expenses the burden thereof must be provided for by way of loan, temporary or permanent; or whether there inheres in Congress the power to increase taxation during the year if exigencies demand increased expenditures. On this question we can have no doubt. Taxation may run *pari passu* with expenditure. The constituted authorities may rightfully make one equal the other. The fact that action has been taken with regard to conditions of peace does not prevent subsequent action with reference to unexpected demands of war. Courts may not in this respect revise the action of Congress. That body determines the question of war, and it may therefore rightfully prescribe the means necessary for carrying on that war. Loan or tax is possible. It may adopt either, or divide between the two. If it determines in whole or in part on tax, that means an increase in the existing rate or perhaps in the subjects of taxation, and the judgment of Congress in respect thereto is not subject to judicial challenge. Wisely was it said by Mr. Justice Cooley in his work on Taxation, page 34:

"'The legislative makes, the executive executes, and the judiciary construes the laws.' Chief Justice Marshall, in *Wayman* v. *Southard*, 10 Wheat. 1, 46. The legislature must therefore determine all questions of State neces-

sity, discretion or policy involved in ordering a tax and in apportioning it; must make all the necessary rules and regulations which are to be observed in order to produce the desired returns; and must decide upon the agencies by means of which collections shall be made. 'The judicial tribunals of the State have no concern with the policy of legislation. That is a matter resting altogether in the discretion of another coordinate branch of the Government. The judicial power can not legitimately question the policy or refuse to sanction the provisions of any law not inconsistent with the fundamental law of the State.' Chief Justice Redfield, in *In re Powers*, 25 Vt. 261, 265. * * * But so long as the legislation is not colorable merely, but is confined to the enactment of what is in its nature strictly a tax law, and so long as none of the constitutional rights of the citizen are violated in the directions prescribed for enforcing the tax, the legislation is of supreme authority. Taxes may be and often are oppressive to the persons and corporations taxed; they may appear to the judicial mind unjust and even unnecessary, but this can constitute no reason for judicial interference."

The claimant is confined to the allegations of its petition to bring the tax paid under the provisions of Section 702 within the purview of Section 3386, Revised Statutes. The claimant bases its right to recover the amount of taxes sued for upon the allegation contained in the fifth paragraph of its petition, which is as follows (R. 2):

> Your petitioner claims that it is entitled to a refund of this amount under authority of the laws of the United States and particularly under authority of Section 3386, United States Revised Statutes, and Section 1310 (c) of the Revenue Act of 1918.

Section 702 is independent of other sections under Title VII. Section 702, in so far as it levies a tax, is complete within itself—it merely refers to the companion Sections 700 and 701, under Title VII, for the purpose of identifying the article or things upon which the tax is levied, *then in existence*. Section 700 and Section 701 prescribes a tax on articles subsequently to come into existence. The tax levied by Section 702 is an excise, not a direct, tax. The Congress had one of two methods of levying the tax, viz: (1) By additional stamps or increasing the value of the stamps theretofore affixed, and (2) by calling it a "floor tax." The Congress has called it a *floor tax*, and thus it must remain. When the articles are lifted or removed from the floor, they can not be sufficiently identified as being the articles which rested on the floor to allow a drawback under the provisions of Section 3386, Revised Statutes. It is well understood that Congress may withdraw its consent to allow *drawbacks*, and it is also understood that it may decline to give its consent in the first instance; and this action would not offend against Article 1, Section 9, Clause 5, of the Constitution. The prohibition fixed by the Constitution is to prevent *a tax on goods solely on the ground that they are*

being exported. An excise imposed on goods manufactured or imported into this country, in different forms at some time intermediate the importation or beginning of manufacture or production and the act of consumption, is not a tax on exports, and it lies with Congress to put them in a class subject to drawback, and not the courts.

It is plainly seen that the Congress anticipated the fact that the emergency tax sought by Section 702 could have been defeated if the articles upon which it was levied had been placed in a class subject to drawback, as all the articles, on the day after the passage of the Act, *held by any person and intended for sale,* could have been continued to be so held and subsequently sold in export trade.

Subsection (c) of Section 1310 of the Revenue Act of 1918 does not apply to the tax *assessed* under Section 702; and certainly it does not apply to the floor tax assessed against claimant's cigarettes on February 25, 1919, as there is no allegation or proof that the cigarettes were *on that day sold for export.* This clause of Section 1310 makes it very clear that Congress did not intend a drawback of the tax levied and assessed under Section 702, unless there existed on February 25, 1919, *a valid consummated sale of the articles embraced therein for export and in due course so exported.* If that condition existed, the tax then becomes one "erroneously or illegally assessed." Such a tax being erroneously or illegally assessed, however, would not be subject to drawback under the provisions of Section 3386, Revised Statutes, but would only be subject to refund under the provisions of Section 3220, Revised Statutes.

III.

Claimant is not entitled to recover, for the "floor tax" was not paid under protest.

While Section 3386, Revised Statutes, and Section 1310 (c) of the Revenue Act of 1918 have been shown to be inapplicable and ineffective as a basis for claimant's contention for an allowance of drawback or refund of the 95 cents "floor tax" imposed by Section 702, there is still another reason why claimant can not obtain judgment in the case at bar. The evidence fails to show that claimant paid the "floor tax" under protest. On the contrary, it is apparent that this tax was paid voluntarily, and that at the time it accrued upon the cigarettes in question they had been removed from the factory and were held by claimant and intended for sale in the domestic market. (R. 3, 4.)

At the time the "floor tax" accrued on the cigarettes claimant evidently regarded the tax as lawfully due. It is admitted in the stipulation herein that claimant inventoried the cigarettes in its return and gave its bond for payment of the "floor tax" within seven months. These acts by claimant were not only voluntary but were in accordance with the provisions of the statute (Section 1306) and of the departmental regulations made in compliance with statutory direction (T. Mim. 2050, pars. 3–4; Treasury Decisions, Vol. 21, pp. 52, 53).

Inasmuch as these cigarettes were then in the legal status of being held by claimant and intended for sale, no reason existed for protesting payment of

the "floor tax." When the tax was paid at the expiration of the period of the bond, no protest against its payment was made. Some time after claimant had complied with the provisions of the statute and regulation, above cited, and had voluntarily paid the "floor tax," it was found desirable, doubtless for reasons of commercial advantage, to export these cigarettes. Accordingly, claimant, without waiting for a reply to its request of August 6, 1919, for an opinion from the Bureau of Internal Revenue upon the question of an allowance of drawback of the "floor tax," entered into a contract on August 19, 1919, for their exportation. This contract was performed between August 29 and November 21, 1919. In view of these circumstances it is fair to assume that the export price received by claimant was sufficiently large to yield not only a greater profit than would have resulted from domestic sale but also enough to cover a liberal allowance for expenses and taxes, including the "floor tax." Independent of any question of profit by claimant in relation to the exportation of the cigarettes, however, it is apparent that claimant has failed to comply with the lawful requirement that taxes must be paid under protest or duress in order to sustain an action to recover. This rule would apply even if the "floor tax" in question had been erroneously assessed and illegally collected, which was not true in the case at bar.

The taxes here collected were paid voluntarily. As said by Judge Cooley in his treaties on Taxation, 3d ed., 1499:

> All payments are supposed to be voluntary until the contrary is made to appear. Nor is the mere fact that a tax is paid unwillingly, or with complaint, of any legal importance, but there must be in the case some degree of compulsion to which the taxpayer submits at the time but with notification of some sort equivalent to reservation of rights.

Taxes thus paid voluntarily cannot be recovered by suit. The mere authorization of a refund by the Commissioner does not furnish sufficient basis for a suit. This Court pointed out in *Chesebrough* v. *United States*, 192 U. S. 253, 263, 264:

> It is one thing for the Government to correct mistakes, return overcharges, or refund amounts exacted without authority, when satisfied such action is due to justice, and quite another thing for the Government to be compelled to repay amounts which in its view have been lawfully collected.
>
> By Section 3220 authority is given and opportunity afforded to do what justice and right are found to require, and the conditions which govern contested litigation may well be regarded as waived, but it does not follow that there is any statutory waiver of such conditions when the Government is proceeded against *in invitum*.
>
> As we have said the purchase of these stamps was purely voluntary, and if, notwithstanding, recovery could be had, it could only be on protest or notice, and there was none such here, written or verbal, formal or informal (pp. 263–264).

To the same effect is *United States* v. *New York & Cuba Mail Steamship Company*, 200 U. S. 488. In that case the taxpayer had affixed to the manifest of a vessel certain stamps required by the War Revenue Act of 1898 in order to obtain clearance under Section 4179, Revised Statutes. No notice of protest against the payment of the tax was made to the collector of internal revenue from whom the stamps were purchased. An action was brought subsequently by the taxpayer to recover the amount paid for the stamps upon the contention that the tax was on exports, and therefore unconstitutional. (The statute there in question had been held unconstitutional in *Fairbank* v. *United States*, 181 U. S. 283.) Notwithstanding this situation, the Court sustained a demurrer to the complaint upon the ground that the tax sought to be recovered had not been paid under protest and duress. In determining the kinds of payments which "must be deemed voluntary," the Court said (pp. 493-494):

> The applicable principle is expressed in the extract from the *Chesebrough case*, which we have given above. It is stated in *Railroad Company* v. *Commissioners*, 98 U. S. 541, and quoted from that case in *Little* v. *Bowers*, 134 U. S. 547, at page 554, as follows: "Where a party pays an illegal demand, with full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person

or property, such payment must be deemed voluntary, and can not be recovered back."

In *Eli Bernays* v. *United States*, 208 U. S. 614, the judgment of the Court of Claims (41 Ct. Cls. 519) was affirmed upon the authority of the two cases above quoted from.

The rule of law discussed and applied in the foregoing decisions of the Supreme Court has also been followed by the Federal courts in *Christie-Street Commission Company* v. *United States*, 126 Fed. 991, 995, and *Procter & Gamble Company* v. *United States*, 281 Fed. 1014, 1015.

In view of the foregoing authorities, applicable to the case at bar, it is insisted that the failure of claimant to pay the "floor tax" under protest prevents recovery by it of any sum paid therefor.

CONCLUSION.

It is submitted that the Court of Claims erred in giving judgment for claimant, and the decree should be reversed.

Respectfully,

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O

Mr. M. C. Elliott, with whom *Mr. W. B. Bell* and *Mr. Forest Hyde* were on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit brought by the P. Lorillard Company to recover by way of drawback a tax paid by it upon 153,-050,000 cigarettes of its manufacture exported after the tax had been paid. The Company recovered in the Court of Claims and the United States appeals. The total was $3 a thousand and was collected under successive Acts as follows. A tax of $1.25 per thousand was imposed by Rev. Sts. § 3394 and was paid in the usual way by stamps for the amount, bought and attached to the original packages before they were removed from the factory. An additional tax of 80 cents per thousand was imposed by the Act of October 3, 1917, c. 63, § 400; 40 St. 300, 312. The cigarettes had not been removed, and the Company paid the additional tax but without attaching new stamps, the practice being to treat the payment as so much added to the cost of the old ones. Then the Act of February 24, 1919, c. 18, Title VII, § 700; 40 St. 1057, 1116, in lieu of the internal-revenue taxes then imposed, raised the tax to $3 per thousand to be paid as before by attaching and cancelling stamps. By § 702, if the goods had been removed from the factory and were held for sale on the day after the Act, a 'floor tax' equal to the difference between the sum already paid and $3 was to be paid. These goods had been removed and the Company, having previously paid $2.05, paid the additional 95 cents. Between August 29 and November 21, 1919, these cigarettes were exported. By Rev. Sts. § 3386, amended, Act of March 1, 1879, c. 125, §16; 20 Stat. 347, a drawback on tobacco, &c., on which the tax has been paid by suitable stamps, &c., affixed before removal, is allowed, 'equal in amount to the value of the

stamps found to have been so affixed.' The Commissioner of Internal Revenue allowed the claim for the \$2.05 paid under the two earlier Acts, but rejected that for the 95 cents paid under the last. The Court of Claims gave the Company judgment for \$145,397.50, the amount of the rejected claim.

The argument for the Government stands on a strict adhesion to the letter of the statute giving the drawback and a narrow interpretation of even the letter of the Act. It contends that only the value of the stamps attached before removal from the factory can be recovered, and, while admitting that the second payment made after the stamps had been bought and attached can be taken as adding to their value, it denies that the payment of what the statute calls a floor tax, paid after removal of the goods, can be added in a similar way. But we are of opinion that the Court of Claims was right. When it is considered that at the time the Act allowing the drawback was passed the tax was collected wholly by stamps, it seems evident that Congress meant to carry the policy of the Constitution against taxing exports beyond its strict requirement and to let the event decide about the tax. In this case if the cigarettes still had been in the factory, the additional payment would have been treated as made for the stamps already on, if that fiction was necessary to secure the rebate. We see no insuperable difficulty in adopting the same device for a payment of the same amount under the same Act by the same people for the same goods, after they had left the factory. And if the payment should be made by a third person who had purchased from the manufacturer it seems to us that if necessary he also might be taken to stand in the manufacturer's shoes, and still to make the payment on account of the stamps. Our opinion perhaps gets some confirmation from § 1310(c)

of the Act of 1919, but we rest it upon what we have said.

A protest was not necessary at the time of payment because, apart from other reasons, at that time the event creating the right to the drawback had not come to pass.

Judgment affirmed.